

JAN 10 1990

In the Matter of:

1987 CABLE ROYALTY
DISTRIBUTION PROCEEDING

Docket No.
CRT 89-2-87CD
Phase II

PHASE II
REBUTTAL CASE OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS

Bernard Korman
ASCAP
One Lincoln Plaza
New York, NY 10023
(212) 870-7510

Of counsel: Bennett M. Lincoff

I. Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, NY 10036-2787
(212) 819-8806

Attorneys for
American Society of Composers,
Authors and Publishers

Dated: January 10, 1990

"COPYRIGHT ROYALTY TRIBUNAL"

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of:

1987 CABLE ROYALTY
DISTRIBUTION PROCEEDING

)
)
) Docket No.
) CRT 89-2-87CD
) Phase II
)
)
)

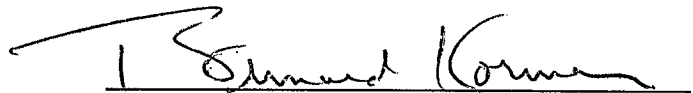
PHASE II
REBUTTAL CASE OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers submits its Phase II Rebuttal Case in accordance with the Copyright Royalty Tribunal's procedural Order of December 5, 1989.

Attached is the rebuttal testimony (including exhibits) of all witnesses. We have prepared such testimony in the form of witnesses' statements which will be summarized, highlighted, or read into the record in whole or in part. We have included tables of contents to that testimony and those exhibits for the Tribunal's convenience.

Respectfully submitted,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS



Bernard Korman
ASCAP
One Lincoln Plaza
New York, NY 10023

Of counsel: Bennett M. Lincoff



Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, NY 10036-2787

Dated: January 10, 1990

TABLE OF CONTENTS

Testimony

<u>Witness</u>	<u>Tab</u>
Gloria Messinger	A
Dr. Peter M. Boyle	B

Witness affidavits will be found following each witness' testimony, before each witness' exhibits.

TABLE OF CONTENTS

Exhibits

<u>ASCAP Exhibit No.</u>	<u>Title or Description</u>	<u>Sponsoring Witness</u>
29R	<u>Broadcasting Magazine</u> Articles Dated July 22 and 29, 1985	Gloria Messinger
30R	Payments for Foreign Repertories in 1987	Gloria Messinger
31R	BMI Code Sheet	Gloria Messinger
32R	Letter Dated January 31, 1989 from Ekke Schnabel to Geoffrey Ellis of PRS	Dr. Peter M. Boyle
33R	Correction Sheet Attached to "Lilies of the Field" Cue Sheet Furnished by BMI	Dr. Peter M. Boyle
34R	Correction of BMI Errors in Its Cue Sheet Analysis	Dr. Peter M. Boyle
35R	BMI Exhibits No. B-8, B-9, B-10 Corrected	Dr. Peter M. Boyle
36R	ASCAP Oscar Winners and National Film Registry Films Carried On Distant Signals in 1987	Dr. Peter M. Boyle
37R	Separate Tallies of "Film" and "TV" Credits	Dr. Peter M. Boyle

REBUTTAL TESTIMONY OF
GLORIA MESSINGER

My name is Gloria Messinger. I am Managing Director of ASCAP, and appear before the Tribunal to give rebuttal testimony on ASCAP's behalf. My background and qualifications were fully set forth in my direct testimony in this proceeding. Written Direct Testimony, p. 1; Tr. 465-466.

I. INTRODUCTION

My rebuttal testimony will primarily address two fundamental claims of BMI's direct case:

1) BMI's claim that the Tribunal's determination should be based on a comparison of license rates negotiated, or fees received, by ASCAP and BMI, rather than the relative share of performances of music in each organization's repertory on distant signals in 1987. Written Direct Testimony of Marvin Berenson, pp. 4, 6-9; Tr. 871-872, 873-876. Contrary to BMI's claim, I believe the Tribunal should distribute the cable royalty fund as closely as possible to the way ASCAP and BMI would using their normal weighting systems. Each organization, after all, is but a conduit in this proceeding. Each is only distributing royalties from

the Tribunal to the writers and publishers who are entitled to those royalties because their works were performed on distant signals.

2) BMI's claim that BMI's local television license rate underrepresents the "true comparative value" of BMI's repertory. Written Direct Testimony of Marvin Berenson, p. 8-9; Tr. 875. Contrary to this claim, BMI's local television license rate was part of a package deal -- the stations got concessions from BMI and, in return, agreed to pay higher fees. If anything, this license rate overvalues BMI's relative share for local television performances.

II. THE PROPER FOCUS OF THE TRIBUNAL'S
DETERMINATION SHOULD BE THE
DISTRIBUTION MARKETPLACE, NOT THE
LICENSING MARKETPLACE

A. Writers and Publishers Rely on the ASCAP
and BMI Distribution Systems to Value
Performances of Their Music in the Marketplace

BMI asserts that the Tribunal's determination in this proceeding should be based in large part on the relative values of the ASCAP and BMI repertories, as BMI claims those values are reflected in the marketplace of performance rights licensing. Written Direct Testimony of Marvin Berenson, pp. 6-7; Tr. 873-874; Exh. B-1 and B-2. BMI's approach misses the point of this proceeding. Here,

the Tribunal is not charged with setting or adjusting a cable compulsory license rate. The rate has been set, the fees have been paid, and Music's total share has been determined. No licensing question is presented.

It is significant, I think, that no other claimant group has any royalty distribution system in place in the marketplace. The Program Suppliers, for example, consist of many separate program producers and syndicators, who proceed on their own in the marketplace to sell their rights and collect royalties, on an individual basis. Because no common distribution yardstick exists among these other Phase I claimant groups, or within any one of them in a Phase II proceeding, the Tribunal might look to amounts paid for different rights. (And, significantly, in Phase I proceedings, the Tribunal has looked for and found a common yardstick -- the Nielsen audience viewing data -- and considered it to be the single most important piece of evidence, and the starting point for its analysis.)

But in this proceeding, common distribution yardsticks do exist: As collective licensing organizations, ASCAP and BMI must, daily, face the same question the Tribunal faces here -- how to distribute a royalty fund. We both do so through established distribution mechanisms which

make distinctions in the way types of performances are weighted.

Mr. Smith testified as to the nature of the BMI distribution system. Written Direct Testimony, pp. 2-4; Tr. 1006-1024; ASCAP Exh. 24X. Although that system may be similar to ASCAP's distribution system in that it makes distinctions in the way types of performances are weighted, I would urge the Tribunal to rely on our system. The ASCAP system, after all, tallies and weights all performances, ASCAP and non-ASCAP alike. But my understanding is that the BMI system does not weight non-BMI performances. Thus, the ASCAP distribution survey gives a "snapshot" of the universe of all performances; the BMI system does not.

In this distribution proceeding, the Tribunal's task is to distribute the royalties already paid by cable operators. Speculation regarding the license fees which cable operators would pay to ASCAP and BMI for freely negotiated licenses might be helpful in the absence of hard data concerning distant signal performances (as was the case in 1978). But, I believe, it is of virtually no probative value when weighed against the hard data we now have.

The royalties already paid by cable operators are to be distributed, the statute tells us, to those copyright owners who establish claims that their works were carried on

non-network distant signals in 1987. 17 U.S.C. §111(d)(3). For this purpose, ASCAP and BMI stand in the shoes of the writers and publishers each represents. Each organization should receive only those royalties to which its members or affiliates would be entitled if they appeared before the Tribunal for themselves, rather than through ASCAP and BMI.

If writers and publishers appeared for themselves, what would the Tribunal do? I think the Tribunal would look at the data to see which works were performed, and how they were performed. I also think the Tribunal would not reinvent the wheel but, instead, would inquire as to how ASCAP and BMI distribute royalties. Each make distinctions in the valuation of different types of performances. I believe the Tribunal would do likewise.

What BMI has presented to the Tribunal is in sharp contrast to this approach: BMI speculates as to the license fees that would be paid to the two organizations if a free licensing marketplace existed, and offers a durational survey constructed just for this proceeding, entirely different from BMI's everyday distribution system. BMI asks the Tribunal to pay more money for performances of BMI music than for comparable performances of ASCAP music, whether measured by the yardsticks of the ASCAP and BMI distribution systems, or even by the yardstick of BMI's durational survey

when its errors, inaccuracies, and methodological flaws are corrected.

If BMI's claim were allowed, the resulting injustice is obvious: They would receive half the royalty fund, for about one-third of the performances. Take the case of a work co-written in collaboration by an ASCAP writer and a BMI writer: If BMI's claim were to prevail, the BMI writer would receive more than the ASCAP writer for the same performance of the same work on the same program on the same distant signal. The Tribunal should not allow that result.

In short, the Tribunal should apply the yardstick which would be relevant to a cable royalty distribution marketplace, not to a cable licensing marketplace: That yardstick measures actual performance of music on distant cable signals in 1987, valued as ASCAP and BMI value them in the normal conduct of business, using their existing distribution systems.

B. Users Rely on Actual Performances as
a Significant Factor in Negotiating
License Fees

BMI claims that, "Without control of program content, cable operators have no reason to pay ASCAP more money than BMI. A license for both repertoires is equally

indispensable." Written Direct Testimony of Marvin Berenson, pp. 8-9; see, Tr. 875, 915-917, 977. Based on my experience in negotiations with all major user industries over more than a decade, and my knowledge of the license fees negotiated by ASCAP and BMI, I can say that BMI's claim may be a description of BMI's negotiating posture, but it is not a description of the reality of the licensing marketplace.

In negotiations, music users differentiate in the values of the ASCAP and BMI repertories, and in the amounts they pay for licenses. The degree to which a user has used and anticipates using music in the ASCAP or BMI repertories, is a significant factor in license fee negotiations. For example, the background music industry (exemplified by Muzak) has agreed to pay ASCAP about 75% and BMI about 25% of the total fees paid to both. They do so, in large part, because the music they perform is, has been, and presumably will continue to be overwhelmingly ASCAP music.

It has been my experience that users with whom we have negotiated consider their relative use of music in the ASCAP and BMI repertories as a significant factor in determining the level of license fees they agree to pay to ASCAP and BMI. If the hypothetical licensing marketplace

were relevant, I believe that the Tribunal should examine the use of music in that marketplace.

III. BMI'S LOCAL TELEVISION LICENSE RATE
OVERVALUES BMI'S REPERTORY IN RELATION TO ASCAP'S

BMI has said that its local television license rate underrepresents the "true comparative value" of BMI's repertory. Written Direct Testimony of Marvin Berenson, pp. 8-9; Tr. 875. The fact is that it overrepresents that value.

First, BMI has misrepresented the ASCAP and BMI local television license rates and revenues. BMI Exh. B-2 purports to show that BMI's "local television revenues" for 1987 were 41.1 percent of the combined ASCAP and BMI local television revenues for that year. This exhibit, in fact, demonstrates nothing about ASCAP and BMI local television revenues; rather, it merely sets forth, incorrectly, the relative local television license rates of the two organizations.

Pursuant to §4(c)(2) of the BMI Local Television Blanket License, BMI's license fees for 1987 were 68% of the amount payable to ASCAP. ASCAP Exh. 17X (exhibit "A", page 4); Tr. 897 (Berenson). Based on its own television license agreement, and assuming that all licensed television stations have paid BMI all that they owed for 1987, BMI

television revenues would be only 40.5% of the combined ASCAP and BMI local television revenues for 1987; ASCAP's share would be 59.5%.

The facts, as shown by ASCAP Exhibits 17X and 18X, are that BMI and the local television broadcasters made a package deal. BMI agreed to withdraw its antitrust suit against the All-Industry Committee and certain broadcasters who were BMI shareholders. BMI also acceded to the broadcasters' request to ask the Department of Justice to modify the BMI consent decree so as to establish a mechanism for Court determination of reasonable license fees, comparable to the mechanism in the ASCAP consent decree.

In exchange for these concessions, the All-Industry Committee agreed to the license terms which are part of the agreement, set forth in ASCAP Exhibit 17X. Thus, it is clear, BMI received higher license fees than it would have received had it not dismissed the antitrust suit and agreed to seek a modification of its consent decree. The broadcasters paid a price for benefits in addition to a television license. As Edward M. Cramer, BMI's President at the time, put it: "Both sides gave up something for something in return." I am attaching as ASCAP Exhibit 29R, two articles from Broadcasting magazine describing the package deal.

IV. SOME MISCELLANEOUS MATTERS

A. BMI has Misrepresented History

We believe that the historical circumstances in which BMI was founded are irrelevant to the Tribunal's determination in this proceeding. However, in order to correct the record, we here set forth the facts, not the fanciful version of history which BMI presented. See, Written Direct Testimony of Robert L. Ahrold, pp. 2-5; Tr. 828-830. The salient facts are as follows:

- Mr. Ahrold says that BMI started "with little more than the determination to provide competition and opportunity." Written Direct Testimony, p.2. In fact, BMI was formed in 1939 at the initiative of the National Association of Broadcasters (NAB), by and for the benefit of its broadcaster shareholders, as the centerpiece of a broadcast industry-wide anti-ASCAP movement, designed to lower the cost paid by broadcasters for their performances of music.

- The "little more" that BMI had included the support of the broadcasting industry and \$1,500,000, raised by the NAB and its then-president, Neville Miller (who became BMI's first President), through pledges from NAB broadcaster members.

- Mr. Ahrold did not know what BMI's initial license fees were. Tr. 838. In fact, the stations paid BMI 50% of the license fees each had paid to ASCAP in 1937, and, in return, received stock in BMI and a license agreement for the performance of music in the then non-existent BMI repertory.

- Mr. Ahrold claims that BMI introduced an "open door" for unrepresented copyright owners. Written Direct Testimony, p.4. In fact, BMI sought the established copyright owners to build its repertory. BMI raided the ASCAP membership and tried to induce some publisher members to license their works through BMI. For example, BMI offered ASCAP publisher member E.B. Marks Music Corporation a guarantee of \$200,000 a year for five years to affiliate with BMI, even though E.B. Marks Music could not move major parts of its catalogue from ASCAP to BMI.

- And the "open door" did not admit writers: For the first ten years of its existence, BMI had no affiliated writers; all royalties were paid to publishers.

B. Other Miscellaneous Matters

- Marvin Berenson testified that BMI "licensed" 77.0% of the RIAA-certified gold albums in 1987. Written Direct Testimony, p.13; Tr. 879. On cross-examination, Mr. Berenson admitted that those 77.0% of the gold albums were

not necessarily entirely BMI -- indeed, in several instances, BMI had only about 5% of the songs on the albums he claimed as "BMI-licensed." Tr. 936-945; ASCAP Exh. 20X.

I asked that record label copy for all the RIAA-certified gold albums be tallied, both as to the ASCAP and BMI shares of songs, and as to the ASCAP and BMI shares of duration.

To do so, we took the RIAA's list of 1987 gold-certified albums. You will remember that Mr. Berenson testified that there were 142 such gold albums. Tr. 942. Checking record label copy for those 142 gold albums revealed that there were 1508 songs on them. The ASCAP and non-ASCAP shares of those songs, and of their duration, were as follows:

	<u>RIAA 1987 GOLD ALBUMS</u>	
	<u>Songs</u>	<u>Duration</u>
ASCAP	57.2%	58.1%
non-ASCAP	42.8%	41.9%

- Mr. Ahrold testified that BMI's "repertoire has been enriched by much of the significant music coming from abroad." Written Direct Testimony, p.5. He agreed that the amounts remitted by ASCAP and BMI to foreign societies for the performances of foreign repertoires in the United States would be a measure of those repertoires' performances in the

United States. Tr. 843. Accordingly, I am attaching as ASCAP Exhibit 30R the publicly available information as to those amounts for four major foreign societies. They show the ASCAP share of performances, by that measure, to be 78.7%.

- Alan Smith professed not to know what the codes on BMI's own performance royalty statements signified. Tr. 1010; see, ASCAP Exh. 23X. I am attaching as ASCAP Exhibit 31R a code sheet which, I gather, appears on the back of every BMI royalty statement.

- BMI deducted \$43,048,000 from ASCAP's total 1987 license fee revenues in their Exhibit No. B-1. They allegedly did so because all those fees were retroactive payments for previous years. BMI Exh. No. B-1, n*; Tr. 889-893 (Berenson). In fact, approximately \$6 million of that amount was a payment for 1987, and should have been included in the amount of ASCAP total 1987 license fee revenues. See, Tr. 892 (representation of counsel).

- Finally, I appear as the sponsoring witness for Exhibits 13X, 15X, 17X, 18X, 20X, 22X and 24X.

V. CONCLUSION

ASCAP should receive between 67% and 72% of Music's share of the 1987 cable royalty fund.

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

-----)
In the Matter of:)

1987 CABLE ROYALTY)
DISTRIBUTION PROCEEDING)
-----)

Docket No. 89-2-87-CD

WITNESS AFFIDAVIT

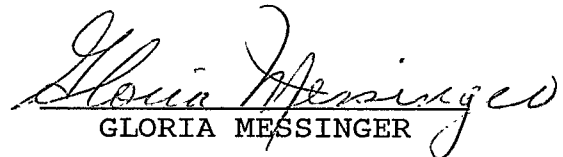
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GLORIA MESSINGER, being duly sworn, states:

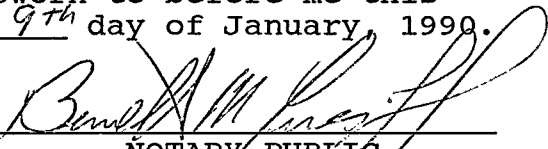
1. I am Managing Director of the American Society of Composers, Authors and Publishers ("ASCAP"). I make this affidavit in support of ASCAP's Phase II Written Rebuttal Case dated January 10, 1990 in the above-captioned proceeding.

2. I am fully familiar with the content of the Rebuttal Testimony of Gloria Messinger and the Exhibits referred to therein.

3. To my knowledge, and upon information and belief, that Rebuttal Testimony and those Exhibits are true and correct.


GLORIA MESSINGER

Sworn to before me this
9th day of January, 1990.


NOTARY PUBLIC
BENNETT M. JUNCOSA
Notary Public, State of New York
No. 254513008
Qualified in New York County
Commission Expires Aug. 4, 1993

BROADCASTING

July 22, 1985

**Broadcasters,
BMI reach
TV agreement****Deal sets new rate structure
and provides for future
disagreements to be settled
by independent rate court**

The All-Industry Television Station Music License Committee and Broadcast Music Inc. "reached an understanding in principle" last week over the rate structure to be used to determine payments by broadcasters to BMI for music licenses through 1987. And BMI will seek to change its consent decree with the Department of Justice to have future rate disagreements settled by a rate court similar to that used in negotiations with the American Society of Composers, Authors and Publishers.

The new BMI fees are stated as percentages of the fees broadcasters pay to ASCAP. The specifics of the ASCAP fee structure are currently up in the air, pending a decision by Federal Magistrate Michael Dollinger. Until that decision, BMI rates are being based on the 1980 ASCAP rate. According to Jack Zwaska, administrative director of the broadcasters' committee, Dollinger's decision is expected "some time in August or September."

In the new BMI agreement, interim (effective until a final determination of the ASCAP rate) and final rates are established. In the interim, for every dollar paid to ASCAP, broadcasters will owe BMI 58 cents for the 23 months between February 1983 and December 1984, 61½ cents in 1985, 65 cents in 1986 and 68 cents in 1987.

After the new ASCAP rates are fixed, the

final BMI rates will be 58 cents for the 1983-1984 period, 65 cents for 1985, 68 cents for 1986 and 70 cents for 1987.

BMI also agreed to match the terms of per-program license arrangements now being negotiated by the committee and ASCAP.

There was praise for the compromise from both sides. BMI President Edward M. Cramer said: "The settlement was not a victory for either side. Both sides gave up something for something in return." Said committee chairman Leslie G. Arries, president and general manager of WTVB-TV Buffalo, N.Y.: "BMI is to be complimented," and he added that he was especially pleased with the rate court called for by the agreement.

The agreement does not affect two items scheduled for a vote at the BMI shareholders meeting this Thursday (July 25). The committee is seeking to reduce the BMI board membership from 16 to 12 and to change the BMI by-laws to prevent its board from offering stock without the approval of shareholders.

The meeting follows a denial by U.S. District Court Judge Edward Weinfeld of BMI's request for an injunction that would have prevented the shareholder meeting that the committee requested and a counterclaim by the committee and five dissident shareholders to prevent BMI from negotiating directly with individual stations, instead of the committee (BROADCASTING, July 1). □

InBrief

ste passed S. 1078 last Friday, which reauthorized Federal Commission at funding levels of \$65.8 million, \$66.8 million and \$67.8 million, respectively, for FY 1986-88. Bill, which marked first time FTC has been authorized since 1980, pleased advertisers. Among its provisions was definition of "unfair acts or practices" as those that may cause "substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition." House is expected to consider legislation soon.

FCC's en banc hearings on Ted Turner's bid for CBS begin at 10 a.m. Thursday (Aug. 1) at commission headquarters in Washington. Nonaffiliated parties testifying in support of Turner, according to FCC, will be oceanographer Jean-Michel Cousteau; Pluria Marshall, chairman, National Black Media Coalition; Richard McDewitt, president, Georgia Alliance for Children Inc.; Jacqueline Meers, executive director, National Business Consortium for Gifted and Talented; C. Robert Kerr, executive director, Georgia Conservancy; William C. Holmberg, program director, Center for Renewable Resources; Christopher Palmer, vice president and executive director, Audubon Television Programs; Johnny Ford, president, World Conference for Mayors, and Michael McDonald, general counsel, American Legal Foundation. Nonaffiliated parties testifying in support of CBS will be Charles L. Jackson, Shooshan & Jackson Inc., and Beverly Chain, director, Office of Communication, United Church of Christ. FCC official said parties had not identified affiliated witnesses who would represent them at hearings.

NBC News President Larry Grossman has told staff that, in covering hostage stories like that in Beirut last month, NBC is "in the business of covering news of interest and importance," and cannot subscribe to stipulations or recommendations that it ignore hostages or their families or even hostage takers on assumption that crisis "will go away" if they are denied coverage. Grossman, in memo to staff that was made public, laid out guidelines division is to follow after top aides reviewed NBC News's coverage of Beirut story last month, story that generated considerable amount of comment critical of manner in which four networks covered 17-day crisis. Only restraints Grossman would apply to such stories are those dictated by "taste and judgment." Guidelines also dealt with frequently heard criticism, such as one that television, in its coverage of Beirut story, had "become part of the story." To avoid becoming participant, Grossman said, NBC News should "cover only what is happening" and should "not become involved as a participant in any way." He also said civil disturbance "will not be broadcast on a live basis except in very special circumstances, and then only with the prior approval of the president or executive vice president of NBC News." Similarly, Grossman said "it is far preferable to tape and edit all interviews" that emerge from terrorist/hostage situations. In cases where live broadcast of interview is considered unavoidable, Grossman said, on-air correspondents "should frequently remind our audiences of the background, circumstances and context" of interviews.

Arbitron and ABC have been hit with \$120-million federal lawsuit filed in San Francisco by KTZO-TV alleging violation of antitrust laws and defamation of stations and its principal, James J. Gabbert. Suit was filed in response to Arbitron delisting KTZO-TV from ratings book for period of June 15-21, 1984, after receiving reports from ABC-owned KGO-TV and Arbitron field representative that KTZO-TV president Gabbert allegedly engaged on two occasions in early June in ratings distortion. According to reports received by Arbitron, Gabbert allegedly told viewers that if they were metered household, to leave their sets tuned to KTZO-TV overnight or when they went outside, adding he was "just kidding." But in suit filed by KTZO-TV, plaintiffs argue one alleged incident never occurred and second occurred different than represented to Arbitron. As a result of what KTZO-TV claims was improper delisting from ratings book, both Arbitron and ABC defamed station and Gabbert and colluded to violate antitrust laws. Suit seeks \$120 million in punitive damages plus general fees and attorney fees.



Swearing in. FCC Commissioner Dennis Patrick (l) was officially sworn in for a new seven-year term last week by FCC Chairman Mark Fowler at a private ceremony in the commissioner's office. Mary Ann Lanchantin, Patrick's confidential assistant, holds the Bible as Fowler administers the oath.

BMI shareholders passed changes in by-laws that will reduce board size from 16 to 12 and prevent offering of BMI stock without shareholder authorization. Vote occurred at meeting requested by five shareholders who are broadcasters. Request for meeting was held in abeyance due to BMI request for court injunction to prevent meeting, and counterrequest by five dissident shareholders (all broadcasters) and All-Industry Television Station Music License Committee. Decision denying BMI request was seen as instrumental in paving way for agreement for new rate structure (BROADCASTING, July 22). Committee requested vote on by-laws so that its interest on BMI board could not be "diluted." It recently dropped request that 75% majority, instead of simple majority, be required for board to pass resolutions. According to committee, of 25,000 votes cast, representing more than 60% of outstanding shares, only 100 were against amendments. Of by-law to prevent offering of stock without approval of shareholders, BMI President Edward M. Cramer said BMI "has not offered new stock in more than 40 years."

Senate Commerce Committee is planning to hold hearing Sept. 19 on rock music lyrics viewed by some as containing sexually explicit language. Issue has gained more prominence since formation of Parent Resource Music Center (BROADCASTING, July 8).

FCC Commissioner Henry Rivera, apparently still searching for another job, has now recused himself from participating in commission proceedings involving law firm of Dow, Lohnes & Albertson. He is still recused from items involving firms of Paul, Hastings, Janofsky & Walker and Schnader, Harrison, Segal & Lewis. Dropped from list of firms are Fisher, Wayland, Cooper & Leader and Gardner, Carton & Douglas ("Closed Circuit," July 1).

National spot radio billings in June soared 37.5% over June 1984 to \$103,327,200, according to Larchmont, N.Y.-based Radio Expenditure Reports (RER), which relies on data collected confidentially each month from 15 leading rep companies. However, when RER adjusts 1984 figure to compensate for variance in five-week standard billing month in 1985, increase is reduced to 10%.

More than few eyebrows were raised last Monday when Securities and Exchange Commission filing was made day before Taft Broadcasting's annual meeting indicating that investor group had purchased 8% of company's stock. Fort Worth-based businessman, Robert M. Bass headed group that said it had bought 722,000 Taft shares at between \$72.06 and \$82.89 per share. Filing added that purchase was made for investment purposes, but that investor group intended to "evaluate the business and prospects" of Taft and "may present to the management its views." Threat to control of Taft was muted next day by shareholder adoption of several provisions bolstering company defenses ("Bottom Line," July 22). Bass and close relatives have family fortune estimated recently by

PAYMENTS FOR FOREIGN REPERTORIES IN 1987

Country (Society)	ASCAP		Received from: BMI		Total	
	\$	%	\$	%	\$	%
Britain (PRS)	17,230,767	77.9	4,881,880	22.1	22,112,647	100.0
France (SACEM)	2,397,303	88.3	319,138	11.7	2,716,441	100.0
Japan (JASRAC)	153,597	75.7	49,399	24.3	202,996	100.0
Australia (APRA)	743,308	70.3	313,878	29.7	1,057,186	100.0
	-----	-----	-----	-----	-----	-----
TOTAL	20,524,975	78.7	5,564,295	21.3	26,089,270	100.0

Note: The above figures are conversions into US dollars of the figures furnished by the respective foreign societies. The same conversion rate has been used in each instance for ASCAP and for BMI. All societies listed have a fiscal year ending December 31 except JASRAC (1987 fiscal year ended March 31, 1988) and APRA (1987 fiscal year ended June 30, 1987).

LEGENDS

RADIO	Feature music in a program broadcast on a radio station which pays BMI license fees.
RADIO THM	<u>Radio Theme</u> — Theme music of a program broadcast on a radio station which pays BMI license fees.
RADIO NET	A radio program broadcast on ABC, CBS, NBC or MUTUAL.
NPR RADIO	A radio program broadcast on a station affiliated with National Public Radio.
CONCERT	A local radio broadcast of a symphony, concerto or other serious work originally written for concert or opera performance.
TV SERIES	An episode of a series shown on a local television station.
TV LOCAL	A local television program other than an episode of a series.
TV MOVIES	A theatrical or made-for-television motion picture shown on a local station.
TV NETWK A	<u>Group A Network Program</u> — A television program broadcast between the hours of 7:00 P.M. and 2:00 A.M. on ABC, CBS or NBC.
TV NETWK B	<u>Group B Network Program</u> — A television program broadcast other than between the hours of 7:00 P.M. and 2:00 A.M. on ABC, CBS or NBC.
PBS TV	A television program broadcast on a station affiliated with the Public Broadcasting System.
CAB TV	A program or motion picture distributed by a cable television programming service with which BMI has a licensing agreement.
BG	<u>Background Use</u> — A feature work used on a local television program (TV LOC BG), a television network program (TV NET BG), a program on a PBS station (PBS TVBG) or on cable television (CAB TVBG) but which is not the main focus of audience attention at the time of performance.
PP	<u>Partial Payment</u> — A local (TV LOC PP), network (TVNET PP), PBS (PBS TVPP) or cable (CAB TVPP) television feature performance for less than the minimum amount of time required for full performance payment.

BONUS LEVELS

E — ENTRY LEVEL BONUS

1½ times base rate

M — MID-LEVEL BONUS

2 times base rate

U — UPPER LEVEL BONUS

2½ times base rate

S — SUPER BONUS

4 times base rate

CONSULT BMI PAYMENT SCHEDULE FOR FURTHER DETAILS

REBUTTAL TESTIMONY OF
DR. PETER M. BOYLE

My name is Peter M. Boyle. I am ASCAP's Chief Economist, and appear before the Tribunal to give rebuttal testimony on ASCAP's behalf. My background and qualifications were set forth in my direct testimony in this proceeding. Written Direct Testimony, pp. 1-2; Tr. 575-576.

I. INTRODUCTION

The principal purpose of my rebuttal testimony will be to show that BMI's so-called 1987 distant signal survey is rife with errors, both in methodology and in execution.

First, BMI made significant errors in its tallying of music performances in its 1987 distant signal survey. It counted the wrong music, or did not count the full duration of music, or completely omitted programs and the significant music performances they contained. As a result, BMI overestimated its share of performances and did not credit ASCAP with its proper share of music performance duration.

Second, BMI made a serious methodological error when it weighted the percentage of music duration on "Film" and "TV" program types, rather than the actual duration of

those musical performances, by the percentage of time occupied by the program types.

Third, BMI misused the Nielsen data by employing it as a stopwatch, measuring program running time alone. The Nielsen data should have been used as it has been used in every previous cable distribution proceeding -- as a measure of program audience size.

Fourth, BMI overestimated the duration of non-ASCAP and non-BMI music.

When these errors are corrected, we find that, using BMI's own durational approach, the respective shares of distant signal music are:

ASCAP	65.3%
BMI	34.7%

II. BMI MADE SIGNIFICANT ERRORS IN ITS 1987 DISTANT SIGNAL SURVEY

A. BMI Did Not Tally Cue Sheets Properly

BMI's tallying of cue sheets was inaccurate and misleading in several respects.

BMI counted the wrong music, drastically underrepresented the duration of all music on certain significant programs, and also drastically underrepresented the duration of ASCAP music on those programs:

Tom & Jerry is a good example. The first problem with BMI's processing of the Tom & Jerry program is that BMI

tallied only cue sheets for "Tom and Jerry" cartoons. But the Tom & Jerry program does not consist of only "Tom & Jerry" cartoons. Rather, as ASCAP survey tapes of the program made during 1987 reveal, the show consists of different elements -- such as "Three Stooges" and "Little Rascals" live-action films, and cartoons other than "Tom & Jerry."^{1/} Thus, BMI tallied the wrong cue sheets for the Tom & Jerry programs.

To correct this error, we analyzed the duration of the omitted music by using cue sheets for all the different elements of the Tom & Jerry program. We did so using the identical methodology BMI followed -- that is, if we could identify the particular cartoon or short feature carried, we used its cue sheet; if we could not, we drew a sample of cue sheets in the same way BMI did and used it to derive an "average" cue sheet.

Our analysis reveals that this was not a minor error. Tom & Jerry appeared on WTBS 11 different times, occupying 15 hours, during BMI's composite week.^{2/} ASCAP's 1987 survey tapes and the cue sheet analysis reveal that the Tom & Jerry program contained an average of 28.73 minutes of

^{1/} See, my written direct testimony at p. 17, n. 20 and my oral testimony at Tr. 616.

^{2/} The Tom & Jerry program also appeared on WPIX for one-half hour during BMI's composite week.

music per hour, or a total of 430.95 minutes of music during a week on WTBS.^{3/} But BMI used only one "Tom & Jerry" cartoon cue sheet -- about 6.78 minutes of music -- for each occurrence of the program. That is to say, BMI tallied a total of only 74.62 minutes of music, rather than the actual 430.95 minutes of music, for the Tom & Jerry program during the WTBS composite week.

The significance of BMI's error is shown by the fact that the omitted Tom & Jerry music occupied 356.33 minutes (the 430.95 minutes of music actually carried less the 74.62 minutes BMI tallied). That equals 42.4% of the total WTBS "TV" music which BMI tallied. And, the overwhelming proportion of the omitted music -- 319.05 out of 356.33 minutes -- was "Other" (i.e., non-BMI) music. Thus, BMI drastically underrepresented ASCAP's total music duration on this very significant (in terms of total time occupied) program.

BMI's tally of music on the Bozo program on WGN is another illustration of the same type of inaccuracy. Once again, BMI tallied the wrong music, undercounted the duration of all music on this program, and underrepresented ASCAP's share of the music on this program. And, once

^{3/} I will express all timings in decimal equivalents, rather than minutes and seconds, for ease of calculation, and to comport with the way BMI presented its results.

again, these omissions are very significant on the durational basis which BMI is advocating.

ASCAP made audio tapes of Bozo programs on WGN as part of our regular survey during 1987. Those tapes show that the show's musical format in 1987 was comparable to its musical format as shown by the 1988 videotape which ASCAP sought to introduce, and as to whose content BMI stipulated (Tr. 1048).

The Bozo program appeared four times in BMI's composite week, twice for an hour's duration and twice for an hour-and-a-half's duration, for a total of five hours. BMI tallied only one "Bozo the Clown" cartoon, with 5.55 minutes of music, for each of the four occurrences of the WGN Bozo program during the composite week. Tr. 1039 (Smith). But that was inaccurate: Each Bozo program contains, on average, 3.34 cartoons per hour, not just one as BMI tallied. And, the cartoons are not exclusively "Bozo the Clown" cartoons -- indeed, an overwhelming majority are not.

Based on the cue sheets for the cartoons which were actually carried on the Bozo program, we find that 170.80 minutes of music should have been tallied. But, BMI tallied only 22.20 minutes. And the BMI share of their tally was 20.4%, compared to the BMI share of 14.1% of the

music in the cartoons actually carried. Thus, BMI not only failed to tally enough music, but tallied the wrong music as well.

BMI also ignored information in its own records on music use. For example, the GI Joe and Transformers cartoon programs were carried on stations WPIX and WGN. In its cue sheet analysis of these programs, BMI credited to itself much of the music in these cartoons, which was written by a PRS member, Johnny Douglas, and published by an ASCAP publisher, Wildstar Music, Inc. But the music was licensed through ASCAP, as BMI knew and acknowledged long before this proceeding began. I am attaching, as Exhibit 32R, a copy of a letter from Ekke Schnabel, BMI's Vice-President-International, to PRS, dated January 31, 1989, which states, "as of this date, we do not claim Johnny Douglas' music for the above two cartoon series." (In fact, ASCAP has paid and continues to pay Mr. Douglas and Wildstar Music for these performances.)

As another example, BMI claimed that all the copyrighted music in the film "Lilies of the Field" was theirs, as shown by their notation on the cue sheet for this movie which they furnished to us in document production.^{4/} But, attached to that very cue sheet as it is kept in their

^{4/} This film appeared on WGN during BMI's composite week.

files, and furnished to us in document production by BMI, was a "correction" which stated that some of the music should be credited to an ASCAP publisher, not to BMI. The "correction" is attached as Exhibit 33R.

B. BMI Omitted Programs with Very Substantial Music Use Because No Cue Sheets Exist for Those Programs

BMI also drastically undervalued total music duration and the duration of ASCAP music because they did not tally music use in any programs for which they did not have cue sheets. This was a substantial error, because one of the programs was Night Tracks on WTBS.^{5/} Night Tracks occupied about 13 hours a week, and, as BMI's own witness admitted, Night Tracks contained virtually "wall-to-wall music." Tr. 1054-1055 (Smith). Let me explain the magnitude of BMI's error:

We timed the duration of music on tapes of Night Tracks made during 1987. Based on this data, Night Tracks accounted for 591.78 minutes of music duration during BMI's composite week. The total non-Night Tracks music duration on WTBS during the composite week which BMI tallied -- for both "Film" and "TV" program types -- was 1,978.63 minutes,

^{5/} I include two shows under the heading Night Tracks: one, entitled Night Tracks, appeared on Friday and Saturday nights for about six hours each, and the other, entitled Night Tracks:Power Play, appeared for one hour during BMI's composite week.

according to BMI's Exhibit No. B-8. Thus, the 591.78 minutes of Night Tracks music on WTBS during the composite week represents 30% of all music duration BMI tallied on WTBS, according to BMI's own figures. BMI's omission of Night Tracks music is thus a very significant error.

Mr. Smith intimated that the music use on Night Tracks would be split 50/50 between ASCAP and BMI. Tr. 1055. But actual tape recordings of the program made in 1987 show that he is wrong. The tapes show that ASCAP music accounted for 68%, and BMI music 32%, of the total Night Tracks music duration. By omitting Night Tracks, BMI has again significantly overstated its share of total music duration, and thus significantly shortchanged ASCAP.

I am attaching, as Exhibit 34R, the corrections that should be made to BMI Exhibit B-8 to account for these and other errors BMI made.

C. BMI Made a Serious Methodological Error in Weighting the Percentage of Music Duration by the Percentage of Nielsen Time

As shown by ASCAP Exhibit 28X, BMI made a serious methodological error when it weighted the percentage of music duration on "Film" and "TV"^{6/} program types on each of the five stations (and the "composite" station) it tallied,

^{6/} By the designation "TV", it appears BMI meant non-motion picture syndicated television programs. Written Direct Testimony of Alan Smith, p. 8.

by the percentage of program time occupied by "Film" and "TV" on those stations. By doing so, BMI was assuming that the average music duration per hour on "Film" was equal to the average music duration per hour on "TV" -- giving the two program types a one-for-one equivalence of music density on each station. The error, of course, is that the average music duration -- the music density -- is not equivalent on the two programming types on any of the stations.

Thus, as is shown by ASCAP Exhibit 28X (a copy of which is attached to this testimony), wild inaccuracies result. In the case illustrated by that hypothetical, BMI would end up with 83% of the "weighted" music duration when it had only 16% of the actual music duration.

This flaw in BMI's methodology is further illustrated if we assume the same facts as in ASCAP Exhibit 28X, but increase the amount of BMI music time in the series episodes to 5 minutes in each episode. Thus, there now would be a total of 100 minutes of BMI music (5 minutes per episode x 20 episodes = 100 minutes). The total music time, allocated between ASCAP and BMI, would now be:

	<u>Time</u>	<u>%</u>
ASCAP Music (all "Film")	100 minutes	50%
BMI Music (all "TV")	<u>100 minutes</u>	<u>50%</u>
Total Music	200 minutes	100%

Using BMI's methodology yields the following:

	BMI Music Time (Min) (1)	BMI Music Time (%) (2)	Nielsen Time (Min) (3)	Nielsen Time (%) (4)	Weighted BMI Time (%) (2) x (4)
Film	0	0%	120	16.7%	0 %
TV	100	100%	600	83.3%	83.3%
TOTAL					83.3%

Thus, whether BMI had 16.7% of the total music time (as in the hypothetical in ASCAP Exhibit 28X), or 50% (as in the hypothetical above), it would nevertheless in each case receive 83.3% of the "weighted" time. In fact, no matter what the amount of BMI music time in the "TV" programs, whether 1 second or 600 minutes, if all the music in the "TV" programs were BMI music, BMI's methodology would award BMI 83.3% of the "weighted" time on the station.

D. BMI Misused the Nielsen Data by Using It as a Stopwatch, Rather Than as a Measure of Audience Size

BMI made another serious error -- by using the Nielsen data simply as a measure of program time, as a stopwatch, rather than as a measure of audience size.^{7/} My understanding is that, every time the Nielsen data has been

^{7/} Nielsen does not measure audience or time between the hours of 2:00-6:00 a.m. on weekdays and 2:00-7:00 a.m. on weekends. (Alan Smith knew Nielsen did not measure audience but did not know whether Nielsen measured time during these hours. Tr. 1060.) Thus, BMI omitted 30 out of 168 hours of programming for each station -- 17.9% of the composite week.

used and relied upon by the Tribunal in prior proceedings, that reliance has been placed on the Nielsen data as a measure of audience size. Therefore, if, as BMI claims, the duration of music is the measure of value which should be weighted by Nielsen data, that weighting should be by the audience size of the "Film" and "TV" program types on each station measured.

III. WHEN BMI'S ERRORS ARE CORRECTED,
BMI'S DURATIONAL ANALYSIS YIELDS A BMI
SHARE OF ONLY 33.7%

Exhibit 35R shows that, when the inaccuracies in BMI's cue sheet analysis are corrected, when the flaw in BMI's weighting methodology is corrected, and when the Nielsen data is used as a measure of audience size and not as a stopwatch, BMI's share of weighted music duration is only 33.7%.

Page 1 of Exhibit 35R is the equivalent of BMI's Exhibit B-8, but corrected to account for BMI's errors in tallying music duration in programs like Tom & Jerry and Bozo and its failure to tally music duration in programs like Night Tracks. Column (1) of the exhibit shows BMI music duration, and column (2) shows non-BMI ("Other") music duration. Column (3), taken from the Nielsen data which both ASCAP and BMI purchased, shows the Nielsen household

viewing per quarter hour for "Film" and "TV" program types on each station.

Page 2 of Exhibit 35R is the equivalent of BMI's Exhibit B-9, but corrected to eliminate BMI's methodological flaw, by weighting actual music duration, rather than percentage of music duration, for each program type, by the actual audience size, rather than the percentage of time occupied, for each program type, as measured by the Nielsen data. Column (4) gives those results for BMI music, and column (5) for "Other" music.

Page 3 of Exhibit 35R is the equivalent of BMI Exhibit B-10, and applies the Larson weights (which both ASCAP and BMI agree upon, Tr. 1031) to the resulting Nielsen-audience-weighted music duration.

The result is a BMI share of 33.7% and a non-BMI music share of 66.3%.^{8/}

^{8/} Alan Smith said that he would be "astonished" if ASCAP's share was 62% when the Nielsen audience data was used to weight the BMI survey results. If we were to ignore the corrections to BMI's music duration tallying which I have detailed in Exhibit 34R, and simply correct the flaw in BMI's methodology by weighting the actual music duration of each station's "Film" and "TV" programs, as given in BMI Exhibit No. B-8, by the Nielsen audience data for each program type on each station, and then by the Larson data, as given in BMI Exhibit No. B-10, the result would be a non-BMI share of 62.4%, the very figure Mr. Smith said would "astonish" him.

IV. SESAC, PUBLIC DOMAIN AND OTHER NONAFFILIATED
MUSIC ACCOUNT FOR 3% OF ALL MUSIC DURATION,
ACCORDING TO BMI'S OWN CUE SHEETS

Alan Smith guessed that 5% of all music on distant signals was neither ASCAP nor BMI music. Written Direct Testimony, pp. 12-13; Tr. 1000-1001. His own data show he is wrong.

I took all the cue sheets which BMI provided to us in document production for WTBS programming. I identified the duration of all the non-ASCAP and non-BMI music on them. This music would be SESAC music, public domain music, or other music which was in neither the ASCAP nor BMI repertories.

I found that all this non-ASCAP, non-BMI music accounted for only 3.0% of the total music duration, and the vast bulk of that is public domain music.

V. SOME MISCELLANEOUS POINTS

A. BMI's Exclusion of Educational Stations
From Its Survey Harms ASCAP

Alan Smith was asked whether BMI's exclusion of educational stations from its survey had any effect. He replied that he "couldn't speculate" on the question. Tr. 1076.

In fact, any such exclusion would harm ASCAP. As was shown by ASCAP Exhibit 6, the three educational stations in the top 64 distant signals, WVIZ, KCET, and WTTW, had ASCAP shares of credits (before adjusting for split works) of 84%, 64%, and 83% respectively. Overall, ASCAP's share of credits on the three stations was 78%. These shares of ASCAP music performed on public broadcasting are considerably higher than for all local commercial stations, or for the subset of all distant signals. Their exclusion thus harms ASCAP far more than BMI.

B. ASCAP's Share of Performances on
WFMT-FM was 85-88%

Marvin Berenson agreed that WFMT-FM was among the most-carried distant commercial radio signals. Tr. 923-924. But he did not know the "mix" of ASCAP and BMI music on the station. Tr. 924.

ASCAP surveyed WFMT-FM in the last calendar quarter of 1986, and in the first calendar quarter of 1988; we did so by analyzing the program guides published by the station which list the music performed. The survey results show that ASCAP's share of copyrighted music (i.e., excluding public domain music) in the fourth quarter of 1986 was 88% and, in the first quarter of 1988, 85%. No analysis was made in 1987, but my experience is that ASCAP's share does not change radically from year to year, especially for

"serious music" such as is performed by WFMT-FM. The consistency of the result for the last calendar quarter before and the first calendar quarter after 1987 support this conclusion.

C. BMI's Cue Sheets Were not Drawn
as a "Random Sample"

An examination of the cue sheets BMI used, which BMI provided in document production, shows that they are arranged in alphabetical or chronological order.^{9/} Because BMI selected the first 13 cue sheets in its file for creation of its "average" cue sheet, its sample was not "random", for each cue sheet did not have an equal chance of being selected. This, of course, is contrary to Alan Smith's claim that the selection did constitute a "random sample." Written Direct Testimony, p. 8; Tr. 1025.

Further, Mr. Smith's testimony could not be accurate: he claimed that BMI "filed [the cue sheets] in the order in which they were received." Tr. 1027. But, as a matter of standard industry practice, cue sheets are forwarded to ASCAP (and, I presume, BMI) as they are prepared -- that is, in chronological order. It is impossible that chronological order will also be alphabetical order. Indeed, the "Cheers" cue sheets which BMI analyzed were not in the order in which "Cheers" cue

^{9/} See, representation of counsel at Tr. 1027.

sheets were received by ASCAP from the program producer -- they were received years apart.^{10/}

The effect of the non-randomness of BMI's sample may be seen in the music tallied on a program called ":20 Minute Workout," carried on WSBK each weekday during BMI's composite week. The cue sheets for this program were prepared by the producer in two series: 1) a cue sheet for each weekday for the episode shown on that day (i.e., a "Monday" cue sheet, "Tuesday" cue sheet, and so forth), prepared in April, 1983; and 2) cue sheets for episodes produced thereafter, prepared in 1984, and not identified by day of the week. BMI used only the first cue sheet in its file -- the "Monday" cue sheet from the first series of cue sheets. But that "Monday" cue sheet contained more BMI music and less ASCAP music than was the average for all the cue sheets. This occurred because there was a shift in writers from the first to the second series of cue sheets -- i.e., from 1983 to 1984. BMI's sample selection systematically excluded the second series of cue sheets -- and so underrepresented ASCAP music -- because it was not a random sample.

^{10/} For example, the "Cheers" cue sheets BMI analyzed, which were all from the start of the alphabet, had the following air dates: 9/26/85, 12/5/85, 4/19/85, 10/16/86, 11/10/83, 10/25/84, 11/4/82, 2/21/85, 1/5/84, 2/21/85, 5/2/85, 10/2/86, 12/11/86. See, ASCAP Exh. 21X.

D. Information Requested by the Tribunal

The Tribunal asked that we identify the number of films listed on ASCAP Exhibits 1-A (Oscar winners) and 2 (films selected by the National Film Preservation Board) which were carried on distant signals in 1987. Tr. 481-482. The results are shown in Exhibit 36R.

The Tribunal asked that we separately tally credits for WTBS "Films" and "TV" on ASCAP Exhibit 10, and make similar tallies for Exhibits 11 and 12. Tr. 619-621. The results are shown in Exhibit 37R.

The Tribunal asked that we tally the audience for programs in our fourth approach (music use weighted by Nielsen viewing across all programs carried on WTBS and the other Nielsen-sampled stations) compared to the total Nielsen-measured audience on stations other than WTBS. Tr. 633. The viewing of these programs on distant signals other than WTBS which Nielsen surveyed accounted for 210,100,734 household viewing hours out of a total of 1,605,123,297, for all syndicated programs and films, or 13.1%.

E. Sponsorship of Cross-Examination Exhibits

I am the sponsor for ASCAP cross-examination Exhibit 28X.

VI. CONCLUSION

As I have previously testified, neither ASCAP nor BMI distributes royalties based solely on the duration of music use, and I do not believe the Tribunal should do so either. However when we correct the errors, inaccuracies, and methodological flaws in BMI's durational 1987 distant signal survey, and deduct the non-ASCAP share from the "Other" share, we find the following shares:

ASCAP:	63.3%
BMI:	33.7%
Other:	3.0%

When the "Other" music is excluded, the ASCAP and BMI shares are:

ASCAP:	65.3%
BMI:	34.7%

This supports the results of the four other approaches ASCAP has advocated, which yielded ASCAP shares of from 67% to 72%.

Docket No. 89-2-87-CD

WITNESS AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PETER M. BOYLE, being duly sworn, states:

1. I am Chief Economist of the American Society of Composers, Authors and Publishers ("ASCAP"). I make this affidavit in support of ASCAP's Phase II Written Rebuttal Case dated January 10, 1990 in the above-captioned proceeding.

2. I am fully familiar with the content of the Rebuttal Testimony of Dr. Peter M. Boyle and the Exhibits referred to therein.

3. To my knowledge, and upon information and belief,
that Rebuttal Testimony and those Exhibits are true and correct.

Peter M. Boyle
PETER M. BOYLE

Sworn to before me this
9th day of January, 1990.


NOTARY PUBLIC

BENNETT M. LINGOTT
Notary Public, State of New York:
No. 31-486266
Qualified in New York County
Commission Expires Aug. 4, 1938



[5]
Recd - 6 FEB 1989
Ansd

- 6 FEB 1989
REPERTOIRE
CONTROLLER

ASCAP Exhibit 32R

Dr. Ekke Schnabel
Vice President
International

January 31, 1989

Mr. Geoffrey Ellis
P R S

Dear Geoffrey, Re: G.I. Joe /The Transformers

This is in reference to your communications to Phil. The above matter developed as follows:

Sometime in summer 1987, Mr. Bill Dobishinski, attorney for the publisher Starwild Music (BMI), met with Mr. Ron Anton advising him that he represented Starwild as well as Mr. Johnny Douglas who had written the music for the above two cartoons. He advised us that originally the music for these cartoons had been affiliated with ASCAP, through an error in the name of Wildstar Music Inc., the ASCAP sister of Starwild Music.

We were unwilling to affiliate retroactively and so the matter never got resolved. As of this date, we do not claim Johnny Douglas' music for the above two cartoon series.

Apparently during the discussion with Mr. Anton and unbeknownst to him, Mr. Dobishinski, I would assume in good faith, thinking that a retroactive affiliation was no problem, had submitted cue sheets to BMI which he had prepared and in which he showed Starwild Music as the publisher.

When our research confirmed that the music had been originally cleared with ASCAP we rejected the cue sheets. Unfortunately, a payment for Johnny Douglas had been made to PRS for Johnny Douglas in the interim. Since, as stated above, Johnny Douglas' music for these two cartoons was never cleared with BMI we had to debit PRS for the amount in question.



January 31, 1989

Page 2.

In the hope that this explanation answers your questions, I remain,

Yours sincerely,

Enke

ES:EG

c.c. Mr. Phil Graham

P.S. Your letter also refers to a program called "MY LITTLE PONY". I know nothing about this particular issue, if in fact there is any.

C O R R E C T I O N

PLEASE REFER TO CUE SHEET #23,002 FOR THE RAINBOW PRODUCTIONS INC (RELEASED BY UNITED ARTISTS CORPORATION) PRODUCTION TITLED "LILLIES OF THE FIELD", AND MAKE THE FOLLOWING CORRECTIONS THEREON:-

ITEM #11, TITLED "FRANKIE AND JOHNNIE" -

THE USE SHOULD BE LISTED CORRECTLY AS VIS VOC PART.

ITEMS #12, 14 AND 32, TITLED "AMEN" -

THE PUBLISHER SHOULD BE LISTED CORRECTLY AS SCHUMANN PUBLISHING COMPANY.

ITEM #30, TITLED "HERMONIUM" -

THIS TITLE SHOULD BE LISTED CORRECTLY AS "HARMONIUM".

KINDLY MARK YOUR RECORDS ACCORDINGLY.

AS OF AUGUST 21, 1964

CORRECTION OF BMI ERRORS IN ITS CUE SHEET ANALYSIS

<u>Station and Program</u>	<u>BMI Music</u>	<u>Other Music</u>
WTBS FILM	226.34	910.98
WTBS TV	461.91	379.40
Tom & Jerry	37.28	319.05
Night Tracks	<u>190.05</u>	<u>401.73</u>
CORRECTED WTBS TV	689.24	1,100.18
 WSBK FILM	 71.35	 297.07
WSBK TV	1,301.30	1,025.25
:20 Minute Workout	(18.42)	13.50
Saber Riders and		
the Star Sheriff	0.04	39.46
Three Stooges	<u>0.00</u>	<u>5.73</u>
CORRECTED WSBK TV	1,282.92	1,083.94
 WPIX FILM	 127.58	 480.84
WPIX TV	1,122.45	728.78
GI Joe	(72.08)	72.08
Transformers	(91.50)	94.25
Tom & Jerry	<u>.63</u>	<u>17.92</u>
CORRECTED WPIX TV	959.50	913.03
 WWOR FILM	 167.70	 329.15
WWOR TV	1,027.52	814.53
Laurel and Hardy	(4.28)	31.91
Superman	<u>1.43</u>	<u>19.53</u>
CORRECTED WWOR TV	1,024.67	865.97
 WGN FILM	 586.35	 604.85
Lilies of the Field	(5.52)	5.52
CORRECTED WGN FILM	<u>580.83</u>	<u>610.37</u>
 WGN TV	 685.27	 638.32
Bozo	19.55	129.05
GI Joe	(28.83)	28.83
Transformers	<u>(73.20)</u>	<u>75.40</u>
CORRECTED WGN TV	602.79	871.60
 CORRECTED WRST FILM	 236.87	 429.36
CORRECTED WRST TV	967.47	933.64

THE PROBLEM WITH BMI EXHS. B-8, B-9, B-10Page 1

1. WBMI is a hypothetical station.
2. It broadcast one movie for 2 hours (120 minutes) during the composite week.
3. The movie contained 100 minutes of music, all ASCAP.
4. It broadcast twenty half-hour series episodes, for a total of 10 hours (600 minutes) during the composite week.
5. Each episode contained 1 minute of music, all BMI, for a total of 20 minutes of BMI music (1 minute per episode X 20 episodes = 20 minutes).
6. Thus, the total music time, allocated between ASCAP and BMI, is:

	<u>TIME</u>	<u>%</u>
ASCAP music	100 minutes	83.3%
BMI music	<u>20 minutes</u>	<u>16.7%</u>
Total music	120 minutes	100.0%

THE PROBLEM WITH BMI EXHS. B-8, B-9, B-10Page 2

Using BMI's methodology as set forth in Exhibit B-9, weighting BMI's percentage of music time by the percentage of Nielsen time, yields the following:

	<u>BMI Music Time (Min)</u> (1)	<u>BMI Music Time (%)</u> (2)	<u>Nielsen Time (Min)</u> (3)	<u>Nielsen Time (%)</u> (4)	<u>Weighted BMI Time (%)</u> (2)x(4)
WEMI Film	0	0%	120	16.7%	0 %
WEMI Series	20	100%	<u>600</u>	83.3%	<u>83.3%</u>
TOTAL			720		83.3%

Thus, although BMI had only 16.7% of the total music time, it received 83.3% of the total weighted music time.

BMI EXHIBITS NO. B-8, B-9, B-10
CORRECTED

Station	Music Duration		Nielsen HH Viewing per Quarter Hr.
	BMI	Other	
	(1)	(2)	(3)
WTBS FILM	226.34	910.98	121,591
WTBS TV	689.24	1,100.18	95,196
WSBK FILM	71.35	297.07	7,007
WSBK TV	1,282.92	1,083.94	3,252
WPIX FILM	127.58	480.84	11,203
WPIX TV	959.50	913.03	6,582
WWOR FILM	167.70	329.15	25,645
WWOR TV	1,024.67	865.97	23,781
WGN FILM	580.83	610.37	58,900
WGN TV	602.79	871.60	38,714
WRST FILM	236.87	429.36	1,351
WRST TV	967.47	933.64	1,080

BMI EXHIBITS NO. B-8, B-9, B-10
CORRECTED

Station	Music Duration Weighted by Nielsen Viewing	
	BMI	Other
	(4)=(1)x(3)	(5)=(2)x(3)
WTBS FILM	27,520,907	110,766,969
WTBS TV	65,612,891	104,732,735
WTBS TOTAL	93,133,798	215,499,704
WSBK FILM	499,949	2,081,569
WSBK TV	4,172,056	3,524,973
WSBK TOTAL	4,672,005	5,606,542
WPIX FILM	1,429,279	5,386,851
WPIX TV	6,315,429	6,009,563
WPIX TOTAL	7,744,708	11,396,414
WWOR FILM	4,300,667	8,441,052
WWOR TV	24,367,677	20,593,633
WWOR TOTAL	28,668,344	29,034,685
WGN FILM	34,210,887	35,950,793
WGN TV	23,336,412	33,743,122
WGN TOTAL	57,547,299	69,693,915
WRST FILM	320,011	580,065
WRST TV	1,044,868	1,008,331
WRST TOTAL	1,364,879	1,588,396

BMI EXHIBITS NO. B-8, B-9, B-10
CORRECTED

Station	Larson Weight	Film & Series Music Duration Weighted By Nielsen Viewing & Larson Data		
		BMI	Other	Total
	(6)	(7)=(4)x(6)	(8)=(5)x(6)	(9)=(7)+(8)
WTBS	0.387	36,042,780	83,398,385	119,441,165
WSBK	0.031	144,832	173,803	318,635
WPIX	0.037	286,554	421,667	708,221
WWOR	0.144	4,128,242	4,180,995	8,309,237
WGN	0.183	10,531,156	12,753,986	23,285,142
WRST	0.216	294,814	343,094	637,908
Total		51,428,378	101,271,930	152,700,308
Share		33.7%	66.3%	100.0%

ASCAP OSCAR WINNERS WHICH
WERE CARRIED ON NONNETWORK
DISTANT SIGNALS IN 1987

<u>MOVIE TITLE</u>	<u>NUMBER OF APPEARANCES*</u>
The Gay Divorcee (1934)	1
One Night of Love (1934)	--
Gold Diggers of 1935 (1935)	--
The Informer (1935)	--
Swing Time (1936)	1
Anthony Adverse (1936)	--
Waikiki Wedding (1937)	--
One Hundred Men and a Girl (1937)	--
The Big Broadcast of 1938 (1938)	--
Alexander's Ragtime Band (1938)	--
The Adventures of Robin Hood (1938)	8
The Wizard of Oz (1939)	--
Stagecoach (1939)	3
Pinocchio (1940)	--
Tin Pan Alley (1940)	2
Lady Be Good (1941)	1
All That Money Can Buy (1941)	--

*The number of each film's appearances on distant signal in 1987 were counted by referring to the Nielsen Data used by both ASCAP and BMI in this proceeding. However, the Nielsen Data underrepresents the actual number of appearances of these films on distant signals in 1987 for the following reasons: the Nielsen survey covered only a six month period; Nielsen did not survey between the hours of 2:00 and 6:00 a.m. on weekdays and 2:00 - 7:00 a.m. on weekends; and the Nielsen survey included only approximately 120 television stations carried as distant signals out of the total of about 620 stations carried as distant signals. Accordingly, many performances of motion pictures and the music contained in them may not be disclosed by Nielsen.

MOVIE TITLENUMBER OF APPEARANCES

Dumbo (1941)	--
Holiday Inn (1942)	1
Now, Voyager (1942)	1
Yankee Doodle Dandy (1942)	15
Hello, Frisco, Hello (1943)	--
The Song of Bernadette (1943)	1
This is the Army (1943)	1
Going My Way (1944)	--
Since You Went Away (1944)	1
Cover Girl (1944)	--
State Fair (1945)	--
Spellbound (1945)	--
Anchors Aweigh (1945)	3
The Harvey Girls (1946)	1
The Best Years of Our Lives (1946)	4
The Jolson Story (1946)	1
Song of the South (1947)	--
A Double Life (1947)	1
Mother Wore Tights (1947)	--
The Paleface (1948)	4
Neptune's Daughter (1949)	--
The Heiress (1949)	--
On the Town (1949)	1
Captain Carey, USA (1950)	1

MOVIE TITLENUMBER OF APPEARANCES

Sunset Boulevard (1950)	3
Annie Get Your Gun (1950)	--
Here Comes the Groom (1951)	--
A Place In The Sun (1951)	3
An American in Paris (1951)	1
High Noon (1952)	4
With a Song In My Heart (1952)	3
Calamity Jane (1953)	3
Lili (1953)	--
Call Me Madam (1953)	--
Three Coins in the Fountain (1954)	2
The High and the Mighty (1954)	--
Seven Brides for Seven Brothers (1954)	2
Love is a Many-Splendored Thing (1955)	2
Oklahoma! (1955)	3
The Man Who Knew Too Much (1956)	5
Around the World in 80 Days (1956)	--
The King and I (1956)	1
The Joker is Wild (1957)	--
The Bridge on the River Kwai (1957)	--
Gigi (1958)	4
The Old Man and the Sea (1958)	--
A Hole In The Head (1959)	2
Ben-Hur (1959)	11

MOVIE TITLENUMBER OF APPEARANCES

Porgy and Bess (1959)	--
Exodus (1960)	5
Song Without End (1960)	1
Breakfast at Tiffany's (1961)	6
West Side Story (1961)	6
Days of Wine and Roses (1962)	3
The Music Man (1962)	3
Papa's Delicate Condition (1963)	2
Tom Jones (1963)	--
Irma La Douce (1963)	1
My Fair Lady (1964)	--
The Sandpiper (1965)	1
Doctor Zhivago (1965)	7
The Sound of Music (1965)	--
A Funny Thing Happened on the Way to the Forum (1966)	1
Thoroughly Modern Millie (1967)	2
Camelot (1967)	--
The Thomas Crown Affair (1968)	4
Oliver (1968)	--
The Lion In Winter (1968)	4
Butch Cassidy and the Sundance Kid (1969)	11
Hello, Dolly! (1969)	4
Love Story (1970)	7
Summer of '42 (1971)	--

MOVIE TITLENUMBER OF APPEARANCES

The Poseidon Adventure (1972)	11
Limelight (1972)	--
Cabaret (1972)	3
The Way We Were (1973)	9
The Sting (1973)	11
The Towering Inferno (1974)	9
The Godfather Part II (1974)	--
Nashville (1975)	3
A Star is Born (1976)	10
You Light Up My Life (1977)	--
A Little Night Music (1977)	--
A Little Romance (1979)	4
All That Jazz (1979)	2
Arthur (1981)	--
Chariots of Fire (1981)	5
An Officer and A Gentleman (1982)	--
Victor/Victoria (1982)	12
Flashdance (1983)	--
Yentl (1983)	--
The Right Stuff (1983)	--
The Woman In Red (1984)	12
A Passage to India (1984)	--
Purple Rain (1984)	--
White Nights (1985)	--

MOVIE TITLE

NUMBER OF APPEARANCES

Top Gun (1985)	--
Dirty Dancing (1987)	--
The Last Emperor (1987)	--

FILMS WITH ASCAP MUSIC
SELECTED FOR THE NATIONAL
FILM REGISTRY WHICH WERE
CARRIED ON NONNETWORK
DISTANT SIGNALS IN 1987

<u>MOVIE TITLE</u>	<u>NUMBER OF APPEARANCES</u> **
The Best Years of Our Lives	4
Casablanca	17
Citizen Kane	3
Dr. Strangelove	2
Gone With The Wind	1
The Grapes of Wrath	3
High Noon	4
The Learning Tree	--
The Maltese Falcon	32
Mr. Smith Goes To Washington	1
Modern Times	--
On the Waterfront	--
The Searchers	6
Singin' In The Rain	8
Snowwhite And The Seven Dwarfs	--

**The number of each film's appearances on distant signal in 1987 were counted by referring to the Nielsen Data used by both ASCAP and BMI in this proceeding. However, the Nielsen Data underrepresents the actual number of appearances of these films on distant signals in 1987 for the following reasons: the Nielsen survey covered only a six month period; Nielsen did not survey between the hours of 2:00 and 6:00 a.m. on weekdays and 2:00 - 7:00 a.m. on weekends; and the Nielsen survey included only approximately 120 television stations carried as distant signals out of the total of about 620 stations carried as distant signals. Accordingly, many performances of motion pictures and the music contained in them may not be disclosed by Nielsen.

MOVIE TITLENUMBER OF APPEARANCES

Some Like It Hot	10
Sunset Boulevard	3
Vertigo	7
The Wizard Of Oz	--

Separate Tallies of "Film" and "TV" Credits

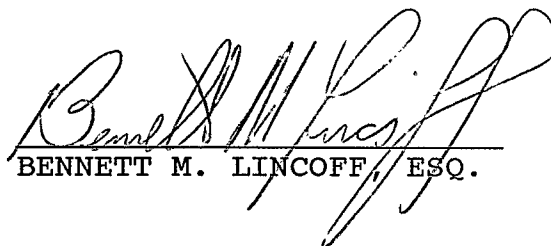
	<u>Credits</u>		<u>ASCAP Share</u>
	<u>Total</u>	<u>ASCAP*</u>	
<u>Exhibit 10 (WTBS Music Census)</u>			
Film	10,049.150	8,210.164	81.7%
Series	<u>17,380.939</u>	<u>11,500.234</u>	66.2%
Total:	27,430.089	19,710.398	71.9%
<u>Exhibit 11 (WTBS Music Use Weighted by Nielsen Special Study Viewing)</u>			
Film	418,963,371	330,072,800	78.8%
Series	<u>525,640,207</u>	<u>301,987,809</u>	57.5%
Total:	944,603,578	632,060,609	66.9%
<u>Exhibit 12 (Distant Signal Music Use Weighted by Nielsen Special Study Viewing</u>			
Film	502,633,257	395,837,998	78.8%
Series	<u>617,382,956</u>	<u>351,394,587</u>	56.9%
Total	1,120,016,213	747,232,585	66.7%

* Adjusted proportionally for split works

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Rebuttal Case of the American Society of Composers, Authors and Publishers were served on January 10, 1990 by hand delivery on the following:

Charles T. Duncan, Esq.
Michael W. Faber, Esq.
Reid & Priest
1111 19th Street, N.W.
Washington, D.C. 20036


BENNETT M. LINCOFF, ESQ.